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AUTHORITIES CITED

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No.....

Supreme Court of the United States

OCTOBER TERM, 1923.

CLAY COOKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondent.

Petition and Notice for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support of Application.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

NO. .....

CLAY COOKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondent.

Notice of Application to the Supreme Court for Writ of Certiorari.

The respondent, United States of America, and its District Attorney, Henry Zweifel, and J. M. McCormick, Special Prosecutor are hereby notified that the petitioner, Clay Cooke, will, on Monday, the 17th day of March, A. D. 1924 at the opening of the Court on that date, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States, in the city of Washington, D. C., his certified petition for a writ of certiorari from the Supreme Court of the United States, to the United States Circuit Court of Appeals for the Fifth Circuit in the cause No. 4068 on the docket of the said United

States Circuit Court of Appeals, styled Clay Cooke and J. L. Walker, Plaintiffs in error, vs. the United States of America, Defendant in error, and you are herewith delivered a copy of said petition for a writ of certiorari and brief in supoprt thereof.

J. A. TEMPLETON,
W. E. SPELL,
CHAS. A. BOYNTON,
E. HOWARD McCALEB,
G. A. STULTZ,
EDWIN C. BRANDENBURG,
Attorneys for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy of the said notice of said petition for writ of **certiorari** and brief is hereby acknowledged on this the.....day of March, 1924, at the City of Fort Worth, State of Texas.

.....
U. S. District Attorney.

.....
Special Prosecutor.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1923.

NO. .....

CLAY COOKE, Petitioner,

vs.

THE UNITED STATES OF AMERICA, Respondent.

Petition for Writ of Certiorari.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Clay Cooke, petitioner, respectfully shows:

On the 26th day of February, 1923, the Clerk of the District Court for the United States for the Northern District of Texas, Fort Worth Division, issued a writ of attachment directed to the Marshal of said District, commanding him to attach the bodies of Clay Cooke and J. L. Walker, and to have them before the Honorable District Court of the United States, at the City of Fort Worth, Texas, instanter, then and there to show cause, if any they have, why they should not be punished for criminal contempt. (R. p. 8).

Which writ the Marshal executed as shown by his return as follows:

> "Received this writ the 26th day of Feb'y, 1923, and executed the same on the 26th day of Feb'y, 1923, by attaching the bodies of Clay Cooke and J. L. Walker, and taking them before the Hon. James C. Wilson, U. S. District Judge, at Fort Worth, Texas, who ordered them in Jail for thirty days." (R. p. 8).

The writ of attachment did not give any notice of the nature of the charge against petitioner, who is a practicing attorney, nor of the charge against his client, J. L. Walker. There was no affidavit for contempt filed nor any other authentic charge. There appears in the record, however, as sent up by the Clerk, what is evidently intended to be the charge against petitioner (Rec. pp. 1 to 7). This consists of some unsigned typewritten mater, without file mark, and not even to this day entered on any record of the Court. Presumptively, it was left with the Clerk by the Judge of the Court, as a basis for said writ of attachment, but is not signed nor entered on any record of the Court, nor did any copy of same accompany the writ of attachment.

This document purports to charge your petitioner and his client, J. L. Walker, with contempt of Court, in writing and causing to be delivered to the Judge of said Court, a letter, set forth in said purported charge as follows:

Fort Worth, Texas, February 15, 1923.

Hon. James C. Wilson,
Judge U. S. District Court,
Fort Worth, Texas.

Dear Sir:

In Re No. 985, W. W. Wilkinson, Trustee, vs. J. L. Walker.

In Re No. 986, W. W. Wilkinson, Trustee, vs. Mass. Bonding Company et al.

In Re 266, Equity, W. W. Wilkinson, Trustee, vs. J. L. Walker.

In Re 69, Equity, Southwestern Telegraph & Telephone Co. vs. J. L. Walker.

In Re No. 1001, In Bankruptcy, Walker Grain Company.

Referring to the above matters pending in the District Court of the United States for the Northern District of Texas, at Fort Worth, I beg personally, as a lawyer interested in the cause of justice and fairness in the trial of all litigated matters, and as a friend of the Judge of this Court, to suggest that the only order that I will consent to your Honor's entering in any of the above mentioned matters now pending in your Honor's Court, is
ing in your Honor's Court, is an order certifying Your Honor's disqualification on the ground of prejudice and bias to try said matters.

You having, however, proceeded to enter* judgment in the petition for review of the action of the Referee on the summary orders

* Typo. error. Should be "previously entered."

against the Farmers & Mechanics National Bank and J. L. Walker and Mrs. M. M. Walker, you, of course, would have to pass upon the motion for a new trial in those matters, and also having tried 984, W. W. Wilkinson, Trustee, vs. J. L. Walker, you will, of course, have to pass upon the motion for a new trial in said cause.

I do not like to take the steps necessary to enforce the foregoing disqualification, which to my mind, as a lawyer, and an honest man is apparent.

Therefore, in the interest of friendship and in the interest of fairness, I suggest that the only honorable† thing for Your Honor to do in the above styled matters, is to note Your Honor's disqualification, or, Your Honor's qualification having been questioned, to exchange places and permit some judge in whom the defendant and counsel feel more confidence to try these particular matters.

Prior to the trial of cause No. 984, which has just concluded, I had believed that Your Honor was big enough and broad enough to overcome the personal prejudice against the defendant Walker, which I knew to exist, but I find that in this fond hope I was mistaken,

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† Typo. error. Should be "The only honorable thing I can do in the above styled matters, is to suggest that Your Honor note Your Honor's disqualification," etc.

also, my client desired the privilege of laying the whole facts before Your Honor in an endeavor to overcome the effect of the slanders that have been filed in Your Honor's Court against him personally and which have been whispered in Your Honor's ears against him, and in proof of which not one scintilla of evidence exists in any record ever made in Your Honor's Court.

My hopes in this respect having been rudely shattered, I am now appealing purely to Your Honor's dignity as a Judge and sense of fairness as a man to do as in this letter requested, and please indicate to me at the earliest moment Your Honor's pleasure with respect to the matters herein presented, so that further steps may be avoided.

With very great respect, I beg to remain,

Yours most truly,
CLAY COOKE.
(Rec. pp. 4-6).

The instrument further recites:

Since the matters of fact set forth herein are within the personal knowledge of the judge of this Court, and since it is the view of this Court that said letter as a whole is an attack upon the honor and integrity of the Court, wherein it charges that the Judge of this Court is not big enough and broad enough to truly pass upon matters pending therein, and wherein it charges in effect that the judge of this Court has allowed himself to be improperly approached and influenced and whispered

> to by interested parties against a litigant in the Court, and since it is the view of this Court that such an act by a litigant and his attorney constitutes misbehavior and a contempt under the law and that the threats and impertinence and insult in said letter were deliberately and designedly offered with intent to intimidate and improperly influence the Court in matters then pending and soon to be passed upon, and to destroy the independence and impartiality of the Court in these very matters, it is ordered that an attachment immediately issue for the said J. L. Walker and Clay Cooke, and that the Marshal of this Court produce them instanter before this Court to show cause, if any they have, why they should not be punished for contempt. (Rec. pp. 6-7).

Petitioner upon being placed under arrest did not know for what he was arrested and required to show cause, but sent his law partner, Mr. P. G. Dedmon, ahead to the Federal Court while the Marshal was arresting Mr. Walker, to learn the nature of the accusation, and on the way to the Federal Building in custody of said Marshal, petitioner met Mr. Dedmon and learned that he was charged with writing said letter, but petitioner was never served with any notice of any kind of the nature of said charge against him, nor was he allowed to read same. The bill of exceptions, pages 16 to 34 of the Record, discloses what occurred when the Marshal presented petitioner before the bar of said Court.

Petitioner first asked to be allowed the benefit of

counsel, which was denied by the Court (Rec. pp. 16-17). Petitioner then requested time to prepare and file his defense (Rec. pp. 17 to 19), which was also denied by the Court, the Judge stating:

> "Unless you desire now to state that you have some defense you care to file and present, and indicate what that defense is to this charge, then I shall direct that this proceeding go forward. Now, if you have any defense that is pertinent, state what it is." (Rec. p. 20).

Your petitioner, thereupon, attempted, while in charge of the Marshal, to dictate to the Court Stenographer a motion for time to employ counsel, read the charge against him, and plead thereto (Rec. pp. 21 to 27), but was repeatedly interrupted and prohibited by the Court from even dictating to the Court Stenographer such motion, the record showing:

> "That the alleged bias and prejudice of his Honor Judge James C. Wilson in the matters in which J. L. Walker was interested is a matter of common knowledge in Fort Worth, and is generally talked and discussed in Fort Worth; that affiant believed that said bias and prejudice—
>
> The Court:
>
> That does not constitute any defense.
>
> Mr. Clay Cooke:
>
> I'll state then something otherwise—

Judge Wilson:

Repeating the insult does not constitute any defense.

Mr. Clay Cooke:

I am not trying to repeat the insult, if your Honor please—that affiant read said letter—

Judge Wilson:

However, as to that, you may later prepare—

Mr. Clay Cooke:

I am now stating my good faith.

Judge Wilson:

I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record.

Mr. Clay Cooke:

That affiant had heretofore been on friendly relations with said Judge James C. Wilson—

Judge Wilson:

That is a matter that is wholly immaterial here, it don't make any difference how friendly.

Mr. Clay Cooke:

I am stating my good faith in writing the letter, and affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of filing the necessary statutory affidavits of disqualification, and if said letter—

Judge Wilson:

Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privilege. You understood as a lawyer how to proceed in order to suggest the disqualification of the Judge.

Mr. Clay Cooke:

I am going to state why I did not proceed—

Judge Wilson:

That does not constitute any defense to this contempt charge.

Mr. Clay Cooke:

Can I put that in about writing the letter? Can I put that in later?

Judge Wilson:

You may." (Rec. pp. 22-24).

Thereupon, for the first time, the purported charge was read by the District Attorney (Rec. p. 27). Whereupon petitioner moved the Court as follows:

Mr. Clay Cooke:

To which the defendants move first, as they have moved, for a postponement and for time within which to plead and for time within which to employ counsel, as heretofore requested.

Judge Wilson:

The motion is overruled.

Mr. Clay Cooke:

Note the exception of respondents to the action of the Court in overruling respondents'

request for a reasonable time to employ counsel and plead.

Defendant excepts to the action of the Court as shown by the foregoing record in refusing to permit them any time to consult counsel or to plead in answer to said rule to show cause; that had defendants been permitted to consult counsel and answer or plead to said writ, defendants would have answered and did thereafter answer as shown by their answer filed in said cause. (Rec. pp. 27-28).

Petitioner naturally assumed that a trial of some nature would be had, and that he would, at least, be given an opportunity to show by evidence that the letter, as copied in the purported charge is not correctly transcribed, and further that the facts set forth in the letter as to the bias and prejudice of the Judge of said Court against petitioner's client were true and that same was based upon "what he had heard" about said client was publicly asserted by the Judge himself, who even stated that he "questioned his own qualification" by reason of such reports that he had heard, and further that in the case tried he had publicly denounced petitioner's client upon rumors he had heard, and that petitioner would be permitted to show by evidence his good faith, friendly intentions, and lack of criminal intent. However, petitioner was given no opportunity to either plead orally or in writing to the charge, after the overruling of his motion aforesaid, nor was he in any manner arraigned or called upon to plead, either as guilty or not guilty, nor was evidence of any kind

offered by the Government to prove the charge, but the Judge peremptorily ordered petitioner and his client to jail for thirty days, without any character of proof of guilt. (Rec. p. 29). In doing so, the Judge took occasion again to denounce petitioner and his client on other matters "he had heard," not embraced in said charge. (Rec. pp. 30 to 32).

That this denunciation was wholly unmerited is clearly shown by petitioner's verified answer and motion in arrest of judgment subsequently filed in accordance with the leave granted, as above shown, which answer and motion in arrest of judgment, also shows conclusively that the sentence was imposed wholly upon the other matters referred to in said sentence, and not for the writing of said letter.

Petitioner and his client were then immediately incarcerated inthe County jail, where they were not permitted to communicate with counsel or friends, until some lawyer friends perfected a writ of error and gave bond without consultation with petitioner. (Rec. p. 35).

Upon the release of petitioner from jail, he immediately employed counsel, prepared and filed his verified answer, supported by affidavits, in the nature of a motion in arrest of judgment, and presented same to the District Judge for action thereon, but said Judge refused to act thereon one way or the other. (Rec. pp. 93 to 98). Petitioner then presented his petition and bond for writ of error, March 19th, 1923, which the Court approved and ordered substituted for

the appeal papers approved and filed by petitioners' friends, while he was held in jail incommunicado. (Rec. p. 35). The assignments of error were filed with reference to this verified answer and motion in arrest of judgment (Rec. pp. 41 to 87), and petitioner procured a stipulation, signed by his Counsel and by the District Attorney, and also by J. M. McCormick, Esq., Special Counsel engaged by the Court to assist in the prosecution, as to the contents of the record on appeal, which included, as a part of said record, said answer and motion in arrest of Judgment being item "e" thereof (Rec. p. 89).

The Judge of the Court scratched this item out of said signed stipulation after it was filed, over counsel's signature, without their knowledge or consent, and orally directed the Clerk to omit same from the record on appeal. (Rec. pp. 93 to 98).

Petition for writ of certiorari was filed in the Honorable Circuit Court of Appeals, for the Fifth Circuit immediately upon filing the record therein to perfect the record by requiring the clerk to send up a certified copy of said answer and motion in arrest of judgment as a part of the record in said cause, which motion was denied April 5th, 1923. (Rec. p. 102).

The transcript on writ of error was duly filed in the Honorable Circuit Court of Appeals for the Fifth Circuit, which Court by opinion rendered December 26th, 1923, reversed the sentence against petitioner's client, but affirmed the sentence against petitioner. (Rec. pp. 94 to 103). The Circuit Court of Appeals

in its opinion holds that petitioner was entitled to a fair hearing on the question of his guilt or innocence of the charge, and further holds that petitioner may not have received the character of hearing to which he was unquestionably entitled, but affirmed said case on the assumption that a fair and legal hearing "would not have benefited" petitioner; this, notwithstanding there was no evidence whatever of guilt or innocence offered, defendant was refused the right to even plead in his defense, and his defense filed later in accordance with the leave granted and incorporated in the record by stipulation of counsel, was ordered out of the record by the trial judge, who himself altered the solemn, signed contract between his own special prosecutor, the District Attorney, and petitioners' Counsel by striking out of said stipulation the said instrument item "e" thereof. (Rec. p. 89).

Petitioner filed in the Circuit Court of Appeals his motion for rehearing on the 7th day of January, 1924 (Rec. pp. 105 to 126), wherein he moved said Court to certify to the Honorable Supreme Court the Constitutional questions involved in said cause, which motion was overruled without written opinion on the 1st day of February, 1924. (Rec. p. 127).

Your petitioner shows that a certified copy of the entire transcript of the record in this case, including proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, to which the writ of certiorari herein prayed for is asked to be directed, is hereby furnished as an exhibit to this petition, as

required by Rule No. 37 of this Court and marked Exhibit A.

The following are the general reasons relied upon by petitioner for the allowance of the writ of certiorari herein prayed for, to-wit:

FIRST.

The Honorable Circuit Court of Appeals has erred in holding that in indirect contempt proceedings, such as this, that the accused

(a) Is not entitled to consult counsel.

(b) Is not entitled to be informed of the charge against him.

(c) Is not entitled to plead fully thereto, in writing.

(d) Is presumed to be guilty unless he establishes his innocence.

(e) Is not entitled to offer evidence in defense of the charge, or in extenuation thereof.

(f) Is not entitled to be confronted with the witnesses against him.

And therein has declined to give force and effect to the Sixth Amendment to the Constitution.

SECOND.

Petitioner's Constitutional rights were violated in the following particulars:

(a) He was denied the privilege of reading the charge against him, and the Honorable Circuit Court of Appeals erred in holding that he admitted dictating the letter set forth in said charge, in that no statement was made by petitioner, after the reading of same, except to move for time within which to plead and for time within which to employ counsel, which motion was overruled.

(b) He was denied the privilege of pleading to said charge in writing and under oath, an inalienable right both at Common Law and under the Constitution.

(c) He was denied the opportunity to consult counsel before pleading to said charge, and the holding of the Honorable Circuit Court of Appeals that a lawyer accused of crime is not entitled to the benefit of counsel is contrary to the express provisions of the Constitution, and the holding that petitioner's law partner appeared for him is contrary to the facts, in that Mr. Dedmon reached the court room, as shown by the record, after sentence had been pronounced and petitioner taken to jail; furthermore the right to counsel, even if granted, without the privilege of consultation, is a barren right, and not that right guaranteed by the Constitution, and the trial Judge had no right to insist upon a statement from accused as a prerequisite to the right to be represented by counsel, and then refuse him counsel.

(d) He was not arraigned, permitted, or required to plead to said charge, even orally.

THIRD.

There is no evidence in the record to support the charge, in that:

(a) No evidence whatever was introduced by the Government.

(b) There was and is no evidence that the letter actually written is as copied in the charge, and petitioner, when under arrest was compelled by the Judge to make his statement with regard thereto, in order to get a little time to read the charge and consult counsel and plead thereto, had not been served with a copy of said charge, nor permitted to read same, nor had same been entered or read in his presence or brought to his knowledge, except through the statement of Mr. Dedmon as aforesaid, and petitioner naturally assumed that the actual letter would be introduced in evidence, and petitioner would be given the opportunity accorded even the darkest criminal to read same and to testify with regard thereto, and such admission as plaintiff in error made, prior to the reading of said charge had reference to the letter actually dictated by petitioner and not the purported copy of same, and in expectation that he would be given time to consult counsel, read the charge, and plead as he was lawfully entitled to do, and that if his request for reasonable time to consult counsel, read the charge and plead thereto were not granted, some semblance of a trial would be had.

(c) Petitioner cannot lawfully be deprived of his

liberty, without any evidence of guilt, solely upon his alleged admissions of dictating a letter to the Judge, when he was refused the right to continue his statement and show his good faith therein, as evidenced by the record, as follows:

> Mr. Clay Cooke:
>
> I am now stating my good faith.
>
> Judge Wilson:
>
> I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bill of exceptions in concluding the record. (Rec. p. 23).

And was then immediately confined incommunicado and prevented from completing his statement, and refused the privilege of adding same later by the trial judge striking it from the record, and the holding of the Honorable Circuit Court of Appeals that such statement made by a defendant in a motion for time to consult counsel and plead can be taken in lieu of evidence and as a substitute for a Constitutional trial violates fundamental human rights and Constitutional guaranties.

FOURTH.

The Honorable Circuit Court of Appeals having held:

> **"The defendants were entitled to a hearing upon the issue of their guilt or innocence,"**

and then having held:

> "Cooke may not have had such a hearing as to his guilt as he was entitled to,"

therein stated the correct law of the case, but having further held:

> "It was, however, sufficient to develop that he was guilty of the accusation, on his own statement in open court, and that a further and more deliberate hearing would have been of no benefit to him,"

erred in the following matters of fact:

The trial judge did not permit Cooke to state his defense to said charge, but only so much as served the purpose of the trial judge, the record showing:

> Mr. Clay Cooke:
>
> I am now stating my good faith.
>
> Judge Wilson:
>
> I mean this, that the Court is not permitting it stated—you may if you regard that as proper, you may state it in your bills of exceptions in concluding the record.
> Mr. Cooke:
>
> That affiant had heretofore been on friendly relations with said Judge James C. Wilson.
> Judge Wilson:
>
> That is a matter that is wholly immaterial here; it don't make any difference how friendly.
>
> Mr. Clay Cooke:
>
> I am stating my good faith in writing the

letter. And affiant believed in writing said letter that he would relieve the said Judge of the embarrassment of finding the necessary statutory affidavits of disqualification, and if said letter—

Judge Wilson:

Now the Court is not caring anything about your suggesting the disqualification of the Court; that is your right before these important trials, but you did not avail yourself of that privflege. You understood, as a lawyer, how to proceed in order to suggest the disqualification of the Judge.

Mr. Clay Cooke:

I am going to state why I did not proceed—

Judge Wilson:

That does not constitute any defense to this contempt charge.

Mr. Clay Cooke:

Can I put that in about writing the letter? Can I put that in later?

Judge Wilson:

You may. (Rec. pp. 23-24).

And such partial statement was made before the charge was read, and before petitioner had an opportunity to know the exact contents thereof, and purely for the purpose of obtaining a postponement for sufficient time to read the charge, consult counsel, and pleaed, and in the expectation that such lawful rights would be granted and a lawful hearing had.

The Honorable Circuit Court of Appeals erred therein in matter of law as follows:

(a) In holding that in criminal proceedings it is incumbent on the accused to prove his innocence, whereas the law required the Government to establish the guilt of the defendant by competent evidence.

(b) In holding that the trial judge can require the accused to make a statement under arrest as a prerequisite to the granting of the right of counsel and time to plead, guaranteed by the Sixth Amendment to the Constitution, and then refuse him leave to complete the statement, refuse him the right guaranteed by the Constitution, and without any semblance of a trial, convict him solely on the portion of his statement that such judge chooses to hear. Such a holding violates both the letter and the spirit of our Constitution ;and would not be thought consistent with the principles of our law, if the charge were the violation of any penal statute.

FIFTH.

The Honorable Circuit Court of Appeals having held:

> "The permission of the Court given him to incorporate his defense in the record, could not take the place of a hearing of his defense before the tribunal before which he was being tried;"

there stated the correct principle of law, but failed to properly apply the said principle to the petitioner

who was refused opportunity to state his complete defense, but given opportunity to incorporate it in the record, as shown by the record above quoted, which procedure displays, not a trial or hearing, and is so found by said Circuit Court of Appeals, but having gotten out of petitioner just so much of a statement as suited his purpose, the said trial court arbitrarily closed his mouth, and gave him permission to add such statement as he chose to make later to the bill of exception, which discloses that the judge had already convicted him before he was arraigned, or called upon to plead, and only granted him the right to state his defenses in a bill of exception, and even this privilege was subsequently denied.

SIXTH.

There was no legal or lawful charge filed against plaintiff in error, in that:

(a) There was no affidavit or other authenticated charge filed against petitioner. The purported charge set forth against plaintiff in error is not signed, filed, nor was same entered on any record of said Court.

(b) Said purported charge does not allege any offense against the law in that it does not allege that any statement made in the purported letter is false, nor does it allege any facts showing wherein said letter obstructed the administration of justice in said Court.

SEVENTH.

No lawful trial was had and no lawful procedure followed in obtaining said conviction, in that:

(a) Petitioner was not allowed to plead to the purported charge.

(b) No evidence was offered against petitioner, and he was not permitted to offer evidence in his defense.

(c) Petitioner was denied the right of counsel.

(d) Petitioner was sentenced for other matters than those contained in the purported charge.

(e) The purported charge does not state any offense against the laws.

EIGHTH.

The record shows that the trial judge punished petitioner for having a detective watch one member of a jury and for questioning the legality of the operations of the trustee and referee in bankruptcy, and not for writing said letter, and petitioner's answer and motion in arrest of judgment, arbitrarily stricken from the record by the trial judge, clearly shows this.

And the Honorable Circuit Court of Appeals erred in denying petitioner's motion for certiorari to bring up the complete record, including defendant's answer to the charge and motion in arrest of judgment filed immediately after his release from custody, because

(a) The trial judge granted leave in open court to the filing of same, and good faith requires that it be considered, because defendant relied upon such leave and privilege.

(b) Same constituted an absolute defense to said charge and should have been considered.

(c) Same was a part of the record of said Court of Appeals and of this Honorable Court, and was arbitrarily stricken therefrom by the trial judge after appeal perfected and all jurisdiction had passed to the Appellate Court.

(d) Government's counsel stipulated in writing with plaintiff in error's counsel that same should constitute part of the record on appeal, and said solemn stipulation was altered by the trial judge after appeal perfected, over the signatures of the parties thereto, and without their knowledge or consent.

(e) The striking of same from the record was a breach of faith on the part of the trial Court, a breach of contract on the part of the Government, and the alteration of said record was a violation of law and the authority and jurisdiction of this Honorable Court.

NINTH.

The issue involved herein is vital to the liberty of citizens under the Constitution, and is of such importance that the record ought to be reviewed by this Honorable Court.

In our brief we cite pertinent authorities of this Honorable Court, in support of the foregoing propositions.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding said Court to certify and send to this Court, on a date certain to be therein designated, a full and complete transcript of the record of all the proceedings of the said Circuit Court of Appeals in the said case entitled **Clay Cooke and J. L. Walker, Plaintiffs in Error, versus United States of America, Defendant in Error,** No. 4068 of its Docket, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief and remedy in the premises as to this Honorable Court may seem appropriate and in conformity with law; and that the said judgment of the said United States Circuit Court of Appeals for the Fifth Circuit in said cause may be reversed by this Honorable Court, and your petitioner will ever pray.

J. A. TEMPLETON,
G. A. STULTZ,
E. HOWARD McCALEB,
W. E. SPELL,
CHAS. A. BOYNTON,
EDWIN C. BRANDENBURG,
Attorneys for Petitioner.

STATE OF TEXAS,
COUNTY OF TARRANT.

I, Clay Cooke, being first duly sworn, on oath state that I am the petitioner in the above case, and that I have read the above and foregoing petition and know the contents thereof and that the allegations therein contained are true as I verily believe.

.....

Sworn to and subscribed before me this.....day of March, A. D. 1924.

.....

Notary Public, Tarrant County, Texas.

We hereby certify that we have examined the foregoing petition, and in our opinion the said petition is well founded in law.

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Attorneys.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Petitioner's Conviction Was Obtained Without Due Process of Law.

The letter, which is apparently the basis for the charge against petitioner, purports to be set forth on page 4 of the Record.

This is dated February 15th, 1923, and is alleged to have been delivered at 11:15 A. M. February 16th. (Rec. p. 3). The charge fails to set forth wherein the delivery of the letter obstructed the administration of justice. It fails to state any offense.

The attachment under which petitioner was arrested and confined was issued ten days later. No notice whatever was given petitioner of said charge, although the trial Judge evidently had ten days time within which to formulate same, employ special Counsel to prosecute petitioner; and then, after such careful preparation, a United States Marshal brings petitioner before the Judge, and there petitioner is denied all reasonable opportunity to investigate the charge, obtain the benefit of counsel, plead thereto, or purge himself of said charge of contempt, and without any lawful procedure whatever, is, without any evidence, without any affidavit of anyone, ordered summarily to jail for thirty days, not for writing the alleged letter, but for other and different offenses, which someone had told the judge about, or concerning which he

held some character of affidavit, which he fails to make public.

It is apparent that the trial Judge did not desire to hear any defense whatever, and the Honorable Circuit Court of Appeals well says that "The permission of the Court given him to incorporate his defense in the record could not take the place of the hearing of his defense before the tribunal before which he was being tried." Yet that Court, in affirming the case against petitioner, retracts its own words by saying "a further and more deliberate hearing would have been of no benefit to him."

Is the conferring of benefits or the infliction of injuries any concern of Justice?

Justice is or should be administered by Courts without regard to benefits conferred or injuries inflicted, but solely because it is Justice. As said by Seneca:

> "He who decides a matter without hearing both sides, though he may have decided right, has not done justice,"

and this is spoken of by Blackstone as a "rule of natural reason.

But the Honorable Circuit Court of Appeals says that though a just and fair hearing, such as petitioner was unquestionably entitled to, was not granted, even if it had been it would not have benefited him. It would have benefited the Court at least to have granted a full, fair and complete hearing, be-

cause injustice injures most him who inflicts or condones it. It would have at least permitted the defendant, while serving his thirty days in jail, at the instance of that Government which in time of war and stress demands and receives his loyalty and devotion, to feel that in return therefor the same Government is equally concerned and careful to guard and protect his liberty and his lawful rights. A man convicted after a fair trial can with good grace accept and endure his punishment, but a man punished without the semblance of a fair trial, by an angry judge in the heat of passion, for what is misunderstood by him to be a mere personal affront, is injured by the procedure, no matter how guilty he may be. It might well be said that a trial would not benefit a robber, murderer or rapist, but this fact does not excuse mob violence, and any Court in the land would be quick to reverse a conviction of a penal offense on this character of a hearing. Should not Courts of Appeal be equally as careful in protecting the fundamental rights of Liberty and the requirements of justice when the offense charged is such that the trial Judge necessarily is personally interested and more than ever likely to deal unjustly?

Chief Justice Taft's opinion in the very recent case of Craig vs. Hecht, p. 124, U. S. Sup. Ct. Adv. Op., 68 L. ed., is illuminating. He states:

> "The Federal statute concerning contempts, as construed by this court in prior cases, vests in the trial judge the jurisdiction to decide whether a publication is obstructive or de-

> famatory only. The delicacy there is in the judge's deciding whether an attack upon his own judicial action is mere criticism or real obstruction, and the possibility that impulse may incline his view to personal vindication, are manifest. But the law gives the person convicted of contempt in such a case the right to have the whole question **on facts and law** reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceedings, and, if not successful in that Court, to apply to this Court for an opportunity for a similar review here."

How then can the Appellate Court or the Supreme Court review both "**questions of law and questions of fact,**" when no lawful procedure is followed, the evidence is suppressed, and the defendant's mouth closed and his answer stricken from the record?

To condone injustice because justice would be of no benefit is merely to say that Courts should be just only where justice benefits some party concerned.

There is no better argument directed at the record in this case that we can make than to quote a great lawyer to whom it was submitted, and who wrote:

> "The pretense of following the formalities of the law had the manner of insincerity, and it would seem that the part of frankness and candor would have put in operation the Lettre de Cachet by which men were consigned to the Bastile when the subject could not reason why."

To make a pretense of following the forms of the law, but denying the substances of all rights, is more oppressive and unjust than not to pretend to follow them at all. Injustice always masquerades in the habiliments of justice, as a lie ever clothes itself in a half truth.

Petitioner's conviction is upheld by the Circuit Court of Appeals solely upon his admission. However, his admission, taken as a whole, and not garbled, entirely exonerates him from any wilful contempt. Let us in fairness, however, examine the facts under which this conoviction was obtained.

Petitioner is representing a client against whom the trial judge harbored great personal prejudice and bias, if not actual malice, which needs no better proof than his sentence of the client in this case. Vast property rights are involved. In the conduct of two cases the judge had openly admitted and disclosed this attitude of mind and had disclosed that it was based upon heafsay concerning the client. Counsel, feeling that no free American citizen in any court ought to be compelled to submit his property rights to a judge who admittedly was so biased and prejudiced from "what he had heard" concerning the client that he "questioned his own qualification" (using the judge's own public language), and feeling that his own sworn duty to his client required him to take some steps to assure that fair and impartial trial to which every citizen is entitled, dictates, with the friendliest intentions possible, a letter to the

judge seeking only a fair judge for his client in future cases, and giving as his reasons only those things which the judge himself had publicly admitted to exist. In this he expressly reserves to the judge the right freely and untrammelled to pass on any unfinished matters, the disposition of which had been entered upon. Ten days later a U. S. Marshal walks into his office and places him under arrest at about 10 a. m., without notice of any charge being filed against him. On his way to the court room he is informed by his partner, whom he meets, that the offense charged is the writing of such letter. He is presented instanter before the judge, where he asks a reasonable time to investigate the charge, consult counsel and plead thereto, all of which fair and reasonable requests are denied, and he is immediately incarcerated, where he is held incommunicado and not permitted to confer with counsel in order to perfect his record and his appeal. And as a good, loyal citizen he is expected to serve 30 days in jail and come out with feelings of high respect for the tribunal that sent him there. This character of procedure will not accomplish the purpose for which all punishments are designed. We can see also that such a practice is not calculated to invite or obtain for courts that public respect which they ought to have, and without which they cannot function properly and effectively.

Petitioner's sworn duty was to see that his client obtained a fair and impartial trial. In view of the many proceedings pending it was manifestly impos-

sible at any stated period to disqualify the judge in undisposed of cases, except at a time when some unfinished matter in another case would be pending before him. However, in these unfinished matters the judge's right to act thereon was expressly acknowledged in the letter, and nothing therein contained could influence any man of ordinary firmness of character, and it is not possible to fairly say that the writer had any such intention; at least no such intention is conclusively evidenced in the letter itself, even if it could be found from the record to be correctly set forth in the charge. We believe we can safely assert that counsel would not have been in contempt had he asked that the judge voluntarily permit even these undisposed of matters to be passed upon by some other judge. The letter discloses, however, that the writer intended to assure the judge that his full and untrammelled right to pass upon these other undisposed of matters would not be questioned by disqualifying affidavit or otherwise.

The most the letter discloses is a mistake of judgment and a too great reliance on the previous friendly attitude of the judge toward the writer. It fails to disclose a criminal intent, which is a necessary element of every crime, and the defendant's statement, upon which alone the conviction is upheld, denies any such intent. The only objection urged by the trial judge in the charge preferred is the statement of the writer's former opinion that the judge was big enough and broad enough to overcome the bias and

prejudice admittedly existing, and the conclusion that he was mistaken therein. This is neither contempt nor an attempt to influence action. It is merely the statement of a truth which this record clearly discloses. It is an unfortunate situation that a lawyer may with flattery and praise freely seek to and actually influence judicial action, but that in truth and candor he cannot give the judge his true situation without being sent to jail. This is not as it should be. As said by a great judge:

> "An independent and unterrified bar is the best assurance of an uncorrupt and incorruptible judiciary."

Constitutional Rights Violated in Procuring Petitioner's Conviction.

Our Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

> "No person shall be deprived of life, liberty or property, without due process of law."

This is a criminal prosecution resulting in deprivation of liberty. That much must be conceded. This Court has so held repeatedly. Each and all of the protective provisions of the Constitution were violated in the procedure. Petitioner was given no in-

formation of the nature and cause of the accusation, he was not confronted with any witnesses against him, he was not allowed process for obtaining witnesses in his favor, he was denied the assistance of counsel for his defense, he was deprived of his liberty without any process worthy of the definition of "due process of law," as given by Mr. Webster in the Dartmouth College case:

> "A law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

How poorly does the record in this case comport with the principles laid down by a contemporary Court of the same judicial system, in **Phillips S. & T. Co. vs. Amalgamated Assn., 208 Fed. 335**, wherein the proper procedure is outlined in the following language:

> "The power to punish for contempt is to be used sparingly and with great caution and deliberation. The purpose in invoking the exercise of such power is the enforcement of the law and lawful orders and the punishment of acts of disobedience. A Court thus called upon to enforce the law may itself keep well within its limits.
>
> "It is not a party to the proceeding. In punishing for contempt the judge acts impersonally, and has no interest or concern other

> than that the law should be obeyed and enforced. **To justify punishment whether of a remedial or punitive character, the charge against the accused and the course of procedure must meet legal requirements, and the proof must conform to the settled rules of evidence."**

If the learned judge just quoted is right, then the procedure in this case is wrong.

The Sixth Circuit Court of Appeals said in **Dana vs. Aluminum Castings Co., 214 Fed. 936:**

> "Respondents were unquestionably entitled to be informed of the charge made against them, and so clearly and definitely as not only to show prima facie a case against them, but that when arraigned they might know what answer to make, and to enable them to prepare their defense."

And this Honorable Court stated in **Gompers vs. Buck Stove & Range Co., 221 U. S. 418:**

> "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt, the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

If these announced principles are correct, then the procedure herein is wrong.

This Court further said in the **Gompers** case:

> "The complainants made each of the de-

> fendants a witness for the company, and, as such, each was required to testify against himself,—a thing that most likely would not have been done or suffered by either party had they regarded this as a proceeding at law for criminal contempt, because the provision of the Constitution that 'No person shall be compelled in any criminal case to be a witness against himself,' is applicable not only to crimes, but also to quasi-criminal and penal proceedings."

If this Honorable Court was right in saying that in contempt proceedings Constitutional limitations are to be observed, then the procedure invoked herein to deprive petitioner of his liberty is unquestionably a violation of the Constitution.

If this proceeding is consonant with the dignity, decorum and orderly administration of justice in Federal Courts, then Constitutional guaranties are like a German Treaty, a mere scrap of paper, to be trampled upon by the Courts, its constituted guardians, whenever the wounded vanity or injured pride of the sitting judge may dispose him to exercise harsh, arbitrary, and unbridled authority.

The evil of not requiring such proceeding to be conducted with decorum and in an orderly and judicial manner was never more apparent than in the instant case. There being no formal charge filed or presented against the defendants, the Court refusing a formal trial, in remanding them to jail assails them upon matters entirely different from the writing

of the letter, matters clearly not within the knowledge of the Court, nor committed in his presence, and upon which he heard no evidence whatever, and the harshness of the sentence is plainly based on these other considerations.

That the constitutional right of trial by jury does not exist in contempts committed in the face of the Court, or contempts so near thereto as to obstruct the administration of justice, does not signify that the other protective provisions of the Constitution can all be ignored. The right of jury trial in such instances did not exist at common law, for the very simple reason that at common law the right of the accused to purge himself of contempt by his oath was held inviolate, and the facts set forth in his oath were not allowed to be disputed, but were taken as true; therefore, at common law no issue of fact could ever arise in a contempt case. But this very reasoning impels the conclusion that the other guaranties of the Constitution do apply to such criminal prosecutions. To deny the right of trial by jury because at common law the defendant's answer could not be controverted and no issue of fact be raised thereon, and then deny the defendant the right to answer is to stultify both the common law and sound reason and violate the Constitution.

It is not liberty to say that a King cannot imprison in jail it is a distinction without a difference. without trial, and then say a judge can. To the man

The Supreme Court of the United States, in the case of **Ex Parte Robinson, 86 U. S. 505; 22 L. ed. 205,** granted a writ of mandamus to the Judge of the District Court for the Western District of Arkansas, requiring him to restore the petitioner's name to the roll of attorneys. His name was stricken from the roll by the judge for an alleged contempt committed in open Court. He had been cited by the Judge by rule to show cause why he should not be punished for contempt in connection with an alleged evasion of process of the grand jury by a witness. He appeared in Court in response to the rule, whereupon the Court informed him that his answer to the rule must be in writing; he stated that the rule did not so state, and thereupon it was ordered by the Court amended to require him to answer in writing and under oath, whereupon petitioner answered: "I shall answer nothing," which the Judge asserted was in an angry, defiant, and disrespectful manner and tone, and that he regarded "the words and the tone, and the manner in which they were uttered as grossly and intentionally disrespectful, and as an expression of an intention to disobey and treat with contempt an order of the Court, and believing that the Petitioner intended to intimidate him in the discharge of his duty, he felt it due to himself and his office to inflict summary and severe punishment upon the petitioner.'

The Supreme Court said, speaking through Mr. Justice Field:

"Before a judgment disbarring an attorney

is entered, he should have notice of the grounds of complaint against him, and ample opportunity of explanation and defense. This is a rule, of natural justice and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property. And such has been the general, if not uniform, practice of the Courts of this country and of England. There may be cases, undoubtedly, of such gross and outrageous conduct in open Court on the part of an attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned. The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power maybe lodged."

Is a man's liberty of less value in the eyes of a Court than real or personal property, or the right to an office? If even in the case of gross and outrageous conduct in open Court, he "should be heard" before he is condemned to lose an office, what can be said in defense of summary deprivation of liberty of person without any, much less "ample" opportunity of explanation and defense? The Court has well said "this is a rule of natural justice," just the same Court later said that "such a judgment is not entitled to respect in any tribunal."

It cannot truthfully be said that the petitioner was afforded even a reasonable opportunity to be heard. He was arrested on an instanter writ of attachment, without notice of any charge against him, taken by the Marshal before the Court, where his efforts to gain a reasonable time to answer, the justice of which must be admitted by every fair minded man, and which was even consented to by the Government's counsel, was denied by the Court. Of what avail is summons or notice if the party is denied the benefit of the notice. As said by Mr. Justice Field: "A denial to the party of the benefit of the notice is to deny that he is entitled to notice at all and the sham and deceptive proceeding had better be omitted altogether."

In the case of **Hovey vs. Elliott, 167, U. S. 409**; the Supreme Court of the United States, speaking through Mr. Justice White, with respect to the power of the Courts of the District of Columbia to punish for contempt, says:

> "In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the Courts of the District of Columbia, notwithstanding the statute are vested with those general powers to punish for contempt which have been usually exercised by Courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a Court, possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer,

and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor and condemn him without consideration thereof and without a hearing on the theory that he has been guilty of a contempt of Court. The mere statement of this proposition it would seem, in reason and conscience, to render imperative a negative answer.

"The fundamental conception of a Court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever is, in the very nature of things, to convert the Court exercising such authority, into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

The following language of Mr. Justice Sayne in **Mc.Veigh vs. U. S. 78 U. S. 11**; though spoken with reference to the deprivation of property rights, is equally, if not more applicable to the deprivation of personal liberty, because the intent to throw every protection around the liberty of the citizen is far more evident in the Constitution than the intent to protect mere property rights. He says:

"The order in effect denied the respondent a hearing. It is alleged that he was in position of an alien enemy and could have no locus standi in that forum. The liability and the right are inseparable. A different result would

be a blot upon our jurisprudence and our civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And Mr. Justice Field in **Windsor vs. McVeigh, 93** U. S. 277, referring to the above language, says:

"The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructice, to a valid judgment affecting his rights is admitted. Until notice is given the Court has no jurisdiction in any case to proceed to judgment, whatever its authority may be by the law of its organization over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or charges made; it is a summons to him to appear and speak if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of the notice would be in effect to deny that he is entitled to a notice at all, and the sham and deceptive proceeding had better be ommitted

> altogether. It would be like saying to a party 'Appear and you shall be heard' and when he had appeared saying, 'Your appearance shall not be recognized and you shall not be heard.' It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

This noble language of Mr. Justice Field condemns the procedure in the instant case so completely that it seems to have been written for this case; and with reference to the above quoted language Mr. Justice White said in **Hovey vs. Elliott:**

> "This language but expresses the most elementary conception of the judicial function."

In **Galpin vs. Page, 85 U. S. 8 Wall, 350,** the Supreme Court said:

> "It is a rule as old as the law, and never more to be respected than now, that no one is to be personally bound until he has had his day in Court, by which is meant that he has been duly cited to appear, and has been afforded opportunity to be heard. Judgment without such citation and opportunity wants all the attibutes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

In re Holt, 55 N. J. L. 384, the defendant was charged with a contempt consisting of a libelous publication against the Court, and an attachment was issued without affidavit or proof, the Court simply acting on its own motion, and thereupon the defend-

ant was taken into custody and gave bail and thereupon moved to set aside the attachment as illegal and unproved, which the Court refused, and proceeded without further proof to adjudge the defendant pay a fine of $1,000 and costs and be imprisoned until the payment thereof, and this being appealed.

Beasley, C. J., said:

> "The members of the Court were the accusers, witnesses and Judges; they took no testimony but convicted the defendant from their own intuitive knowledge. It is not necessary to say that such a course had not, in any respect whatever, the least semblance of a proceeding in a Court of Law."

And **in re Pittman, 1 Curt. (U. S.) 186,** after speaking of the criminal nature of the process in contempt of Court, Curtis, J., said:

> "The character of the proceeding should not be lost sight of, and especially it should not be so varied as to deprive the party proceeded against of any substantial right. Now one of the most important privileges accorded by law to one proceeded against for contempt is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact by any other evidence."

The due administration of justice calls for the exercise of Justice on the part of Courts, and their dignity and public respect for their judgments demand

that they proceed, especially where they are personally interested, with decorum, assuring the defendant every time honored right to present whatever he or his counsel deem necessary or expedient in defense or mitigation of the offense charged. The harsh, arbitrary, and unseemly manner in which the Judge below proceeded in his endeavors to vindicate his own injured personal pride, denying the defendants all those rights which fair-minded men would at once accord them, no matter how guilty, is far more detrimental and injurious to public respect for the Courts than any private letter counsel might write to a Judge in the heat of anger or feeling of outraged justice.

A Court cannot expect public respect for its decrees and judgments when it renders them in a manner that does violence to those fundamental principles of justice which are deeply imbedded in the Anglo-Saxon nature.

The Court would not permit counsel to explain even orally the circumstances under which the letter was written, and it is not even proven that the letter is correctly copied in the charge. Counsel did state that he dictated the letter with the friendly intention of relieving the judge of embarrassment in the trial of the cases. It starts out with the assertion that it is written "as a friend to the Judge of the Court," and when counsel attempted to show that his intentions were friendly the Judge said "it maked no

difference how friendly." This is a cruel sentence which had better been left unsaid.

Lord Bacon has well said:

> "Those friends are weak and worthless that will not use the privilege of friendship in rebuking and admonishing their friends with freedom and confidence, as well of their errors as of their danger."

If this method of procedure is permitted, then there are no restrictions whatever on Federal Judges in the matter of punishing for contempt. The individual's liberty is as precarious as it was before Magna Charta was conceived.

The Appellate Courts have always exercised the right to review in contempt cases. The Supreme Court even has frequently taken jurisdiction on original writs of habeas corpus on account of the importance of the matter. Therefore, if this right to review is to be intelligently exercised by the higher Courts, there must be a trial conducted in accordance with the usual and customary methods and some record made, which an upper Court may review. To strike out defendants' sworn answer, to refuse to hear evidence, to alter the record after appeal taken is not only to infringe defendants' rights but infringes the jurisdiction of the Court of Review.

Art. 1245d U. S. Comp. Stat. 1918, states that "Contempts committed in the presence of the Court, or so near thereto as to obstruct the administration of

justice, may be punished in conformity to the usages at law and in equity now prevailing." Congress recognizes that there are particular usages at law and in equity then prevailing with respect to the punishment of such contempts. If the Judge could punish at his will Congress would not have mentioned the usages and customs whereby such causes are tried and punishment inflicted. It has never been held that the Court could summarily commit to prison, without a charge or affidavit being filed, notice to the accused, an opportunity to purge himself by answer, and the introduction of evidence showing guilt.

The record conclusively shows that no fair opportunity was given the defendants to answer the charge; they were not allowed to plead, or consult counsel, although the Court had prepared for ten days for the prosecution, and employed a special prosecutor from Dallas; had set the stage as it were, and then sends out his Marshal, hales the defendants before him in custody, without service of any notice of the charge upon them, and when they attempt to make even a verbal motion for time to plead are repeatedly interrupted and refused hearing, as witness the following:

Mr. Cooke:

"I am now stating my good faith.

Judge Wilson:

"I mean this, that the Court is not permitting it stated—you may if you regard that as proper you may state it in your bill or exceptions in concluding the record."

Then without permitting him to state his good faith he was hustled off to jail and held in communicado, not permitted to telephone or consult counsel, and when after release he files such sworn statement it is summarily striken from the record.

Mr. Cooks:

"That affiant had heretofore been on friendly relations with the said Judge James C. Wilson—Judge Wilson. That is a matter that is wholly immaterial here, it don't make any difference how friendly.

Mr. Cooke:

"I am stating my good faith in writing the letter. And affiant believed in writing said letter he would relieve the said Judge of the embarrassment of filing the necessary statutory affidavits of disqualification, and if said letter—"

Here affiant was intending to state, as he did later in his formal answer and motion in arrest of Judgment, that if said letter contained any language to which the Judge did or could take exception to it was due to the fact that affiant dictated same hurriedly and depended on his law partner, Mr. Dedmon, to read same after it was transcribed, and Mr. Dedmon being suddenly called to Austin, while affiant was absent laid the letter back on affiant's desk without reading it, and on Saturday morning, just before nine o'clock affiant having an engagement in the District Court of Tarrant County, hurriedly sealed the letter, marked it personal, and handed it to Mr. Walker to

deliver, affiant going immediately to the County Court House. (It must be noted that up to that time the defendant had not even seen said letter or the charge brought. It was later read by the District Attorney), but here he was again interrupted:

Mr. Cooke:

I am going to state why I did not proceed—
Judge Wilson:

That does not constitute any defense to this contempt charge.

Mr. Cooke:

May I put in about writing the letter? May I put that in later?
Judge Wilson:

You may."

After the incarceration incommunicado of the defendants they were not permitted to put it in later.

They filed their answer in full in connection with motion in arrest of judgment immediately after their release from custody; they also filed a stipulation of counsel that it might be included in the record before this Court. The only object of getting the permission to file it later was that upon review this Honorable Court might be advised of the facts. After the appeal was perfected Judge Wilson scratched out of the stipulation of counsel (item e Rec. P. 89) this answer and motion in arrest of judgment, and directed the clerk to omit it from the transcript to be filed in this Honorable Court.

We believe that a Court attempting to try defendants against whom the judge harbored such ill will as is exhibited in this proceeding is error in itself.

If there were no decisions and no laws a just man by nature would know that this procedure was wrong.

So far we have discussed the manner, form, and process by which the defendants were convicted and sentenced. This we confidently assert was not that "due process of law" as understood under the Manga Charta, the Common Law, or our own Constitution.

The sentence is a mere arbitrary edict without semblance of process of law, and if permitted to stand will tend to bring the courts into disrespect of the public and cause further legislative restriction of their authority.

No Offense Was Charged Upon Which to Base Petitioner's Conviction.

We desire, however, to consider whether the offense presumably chared constitutes a contempt of court at all under the restrictions placed by Congress on the power of Federal Courts.

Sec. 725 provides: "The said Courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of thetir authority. Provided that such power to punish contempts shall not be construed to extend to any cases, except the misbehavior of any person in their presence, or so

near there to as to obstruct the administration of justice."

A commitment for contempt is void for excess of power; the punishment being imposed for supposed perjury alone without reference to any circumstances or condition giving to it an obstructive effect.—Ex. **Parte Hudgins, 39 S. Ct. 337, 249 U. S. 378, 63 L. ed 656.**

The Honorable Circuit Court of Appeals for the Fifth Circuit in its opinion herein filed says:

> "While the statute provides a method for disqualifying a judge there could be no impropriety in addressing a judge in a proper way, to secure his voluntary retirement. The propriety of the letter depends upon the language used by the writer in addressing the judge. Language, appropriate in an affidavit of disqualification, might not be used with propriety in a private letter addressed to the Judge."

Is it possible that citizens are to be incarcerated in jail for thirty days upon a mere question of propriety of certain conduct? The wisest judge once said, "If thy brother offend, rebuke him." The Circuit Judge says now: "If thy brother on the bench offend, say nothing to him, lest it be considered an impropriety and you go to jail, but you may safely publish the facts to the world." Good men and honest may be as far apart as the poles on a question of propriety, but crime is based primarily upon criminal intent coupled with a criminal act.

The Honorable Circuit Court of Appeals further defines the offense, as relied upon by the Government as follows:

> "The part relied upon by plaintiff as constituting the contempt is the statement that prior to the trial of the recent case of his client, Walker, the writer had believed Judge Wilson big enough and broad enough to overcome the personal prejudice against his client, which he knew to exist, but that the trial of that case had convinced him that he had been mistaken in entertaining that belief; that his client had desired but had not obtained the privilege of stating his answer to the slanders that had been filed in Court, and whispered in the ears of the Judge Wilson against him; that the writer's hopes in this respect had been rudely shattered, and his confidence in Judge Wilson destroyed, and he was for that reason voluntarily appealing to Judge Wilson to voluntarily disqualify himself in the other cases of his client." (Rec. p. 172.)

The learned Circuit Judge then proceeds:

> "At the time of the delivery of the letter, it appears from the recital that Judge Wilson was still to be called upon to hear the motion for a new trial in the case which had just been tried, and also certain bankruptcy proceedings, all of which had proceeded too far for an exchange of udges. The natural tendency of the letter was to destroy the calm and dispassionate consideration by Judge Wilson of the pending matters, which it was his duty to give."

The best answer to this reasoning is the very forceful language of Mr. Justice Holmes in the **Toledo Newspaper Co. Case, 247 U. S. 402:**

> "But a judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a judge could have found in anything that was printed even a tendency to prevent his performing his sworn duty."

In that case because the publications were made to the public generally and were likely "to arouse distrust and dislike for the court," and prevent obedience to its decrees if rendered, it was deemed sufficient to justify an information and fine, though after a formal trial.

In this case the Circuit Court of Appeals says because, to avoid publicity, counsel's position was communicate personally and privately, even unknown to his client, it would prevent one supposed to have dignity, poise, and power requisite for a high judicial office, from calmly considering matters which the letter itself acknowledged his full right to pass upon, with every assurance that no steps would be taken to disqualify him therein.

Indeed has a high office fallen into low repute if the occupant must be so zealously guarded from injury to pride or feelings. The truth is flattery and praise, so freely expended by some is more likely to influence action and interfere with justice but no one ever thought of punishing for contempt one who

pours honey in the judge's ears, but the **truth** spoken with candor merits immediate and summary imprisonment, even though spoken as a friendly rebuke.

The purported letter itself does not charge the Judge with anything which would or could be considered as a threat or intimidation as charged. The letter assets that it is written by the lawyer "as a friend of the judge of the Court." It relates entirely to matters not even set for trial and in which the Judge was subsequently disqualified by affidavit to try same in strict accordance with the statute. Therefore, as he can enter no future orders in any of the cases made the subject of the letter, and evidently was not expected to do so, the letter could not "obstruct the administration of justice" in any of said causes. The Judge seems to infer that the letter being delivered (as he claims) during a ten minutes recess in the trial of another case, not in anywise connected either with the letter or the defendants, it tended to obstruct the administration of justice in that case, but it could hardly be suggested that the letter would so far upset the Judge as to prevent him fairly continuing the trial of an entirely foreign case then pending. To even think so is to ascribe to him a lack of self-control wholly incompatible with the dignity of his position. It is apparent from the letter that counsel never expected the Judge himself to pass upon any of the cases made the subect of the letter. The Judge asserts that it is his view that the letter was intended to "destroy the very fairness an impartiality" of the Judge acting on certain motions

for rehearing which were not the subect of the letter.

The letter was not written about these at all, but to save any doubt, the letter asserted that no question as to his right to pass on these other matters was raised—in other words, his absolute right to pass upon them was conceded, and the letter merely referred to them so as to make it clear that his right to pass on same would not be raised, but on other cases he would be disqualified in the statutory method unless he voluntarily exchanged benches or disqualified himself. Is there anything in this that could have the effect of intimidating the Judge or obstructing the administration of justice? To hold so would be to hold the Judge to be of very weak character indeed. Certainly no intention to intimidate could be imputed to the writer. He did not expect a favorable decision in any matter, nor did he ask or seek such. He merely sought his voluntary disqualification in future matters, conceding his full right to act upon any pending or unfinished matters. Certainly it is not right for the Judge to suppress the evidence tendered by defendant as to his intent and motives and then conclusively presume motives far from his mind. It would be just as logical and just as fair to assume that these contempt proceedings were instituted to intimidate the lawyer from performing his sworn duty to his client to disqualify the Judge in the statutory method, as to assume that the letter was intended to intimidate the Judge. Certainly, the contempt proceedings did not have the effect of intimidating the lawyer, as disqualifying affidavits were

immediately filed in all of the cases mentioned in the letter as soon as he was released from custody and it does not appear wherein the letter intimidated the Judge, as he promptly overruled all motions for rehearing on the other matters pending.

In the case of the **United States vs. Craig, 279 Fed. 900,** the defendant was committed for writing a letter in which numerous serious charges against the judge were made reflecting upon the handling of a receivership proceeding then pending. A fair trial was had on information filed by the District Attorney, defendant was represented by counsel and testified in his own behalf, but was convicted by the trial court and committed with the proviso that he might purge himself by filing an unqualified retraction of the alleged false charges with the clerk.

A Judge of the Circuit Court of Appeals for the Second Circuit in exparte **Craig, 274 Fed. 185,** released the defendant on writ of habeas corpus, stating in his opinion as follows:

> "It will be observed that the entire letter refers to the denial of the application to appoint a co-receiver. The purport of the letter, taken as a whole, is a criticism of the District Judge who denied the application. * * * **In determining whether the language used was or was not a contempt regard must be had not merely to the very words used but to the surrounding circumstances in connection with which they were used.** In constructive contempt, such as is charged here, where the

language used is not per se libelous, or is fully capable of innocent meaning, the intention of the offending party is a factor and may control. So where the publication complained of can have no tendency to prejudice the case, the publisher may not be found guilty of contempt. To vindicate the dignity of the court in compelling respect and obedience a judge may best demonstrate his title to respect by keeping within the confines of judicial obligation and not reaching out beyond his powers to visit punishment upon another official who acts within the limit of what he conceives to be his duty and who atempts, whether inadvisably or otherwise, to secure some means of keeping his employer advised by right of access rather than favor of access to papers and information concerning the railroad properties. There is no divinity about the office or duties of a judge that makes him free from criticism. The statute required a misbehaviour which causes an obstruction of the administration of justice. It is well settled that where his contempt is committed without the presence of the court, every reasonable doubt will be resolved in favor of the accused. The charge is quasi criminal. By no interpretation can the letter be said to have any tendency to embarrass or influence the court so far as to prevent a fair trial or a just conclusion in regard to any matter which was then pending before the court. To have adjudged this misbehavior, so near the presence of the court as to obstruct the administration of justice was to exercise power beyond the jurisdiction of the district judge."

"The rule throughout, relied upon by the ac-

cuser is the Toledo Newspaper case. There the court imposed punishment for newspaper publication. This was done on the ground that the publication obstructed justice. It was a very extreme case. It consisted of continuous and protracted attacks upon the judge. The Circuit Court of Appeals stated (237 Fed. 986) upon this record the publications had reference to pending judicial action and there is a finding of fact that they tended and were intended to provoke public resistance to an injunctional order if one should be made and to intimidate, at least unduly influence the district judge with reference to his decision in the matter then pending before him.

"He stands convicted upon the letter alone and such inference as may be drawn therefrom. His conviction rests upon an issue between the court and the defendant and it is one of terminology and interpretation. There is no criminal intent discoverable from this record to support interpretation that was placed upon it by the court, nor was there pending sub judice a proceeding before the court at the time the letter was written. The conclusion is irresistable that the court exceeded its jurisdiction by an excess of power in adjudging the defendant guilty. The petition for discharge is granted."

While this decree releasing Craig on writ of habeas corpus was reversed by the Supreme Court it was merely upon the ground that, instead of appealing from the contempt decree, Craig availed hisself of the wrong remedy.

In the letter under consideration, it is plainly evi-

dent that the sole intention of the writer was to induce the judge to note his disqualification in all of the cases made the subject matter of the letter. None of these cases had been set down for trial. In the three rehearings which were pending before him, it was expressly stated in said letter that his right to pass upon said pending matters would not be in any wise questioned. The judge in the court below takes the position in his inquisition of the defendant, Cooke, that the attempt to procure his disqualification was not in the statutory manner. He loses sight of the fact that prior to the trial just concluded his deep seated prejudice by reason of which as stated by him, he "questioned his own qualification" was known only to himself, and the due administration of justice required, not that the defendant proceed in a statutory manner to procure his disqualification, but that he voluntarily recuse himself. Nothing is so obstructive of the administration of justice in the courts as bias and prejudice on the part of the presiding Judge. Prejudice and justice cannot exist in the same mind at the same time, because they are utterly antagonistic mental qualities. Therefore, since the judge admits that he, "was biased and prejudiced," that this was based upon heresay, his sitting in the case was in itself more an obstruction to justice than any protest thereof could in any wise be. Therefore, the only effect of the letter, the only purpose of the letter was to procure the due and proper administration of justice in behalf of the defendant and to preclude and prevent the personal bias and prejudices of the judge

so developed over a long period of years and admitted by him to exist from intervening itself between the property rights of the defendant and the eternal principles of justice. It cannot be without proof presumed conclusively that the letter was written for the purpose of obstructing the administration of justice, nor can it be conclusively presumed that it did obstruct the administration of justice. Its effect might more properly be held to effect the administration of justice rather than to obstruct it. However, uncomplimentary of the personality of the judge it may be it was not libelous per se nor did it pertain to any matter so far as the disqualification of the judge was concerned then pending or which the defendant ever proposed would be pending before the district Judge.

The Proverbs say:

> "He that rebuketh a man afterwards shall find more favor than he that flattereth with the tongue."

The letter itself shows that it was written in a friendly spirit, however, unfortunate the wording may have been.

A sentence imposed for an offense not charged is void. 16 C. J. 1303.

It is plain from the Court's own statement that the offense he had in mind in fixing the penalty was not the writing of the letter so much as it was certain matters believed to be contained in defendant's pleadings, else why does he direct such pleadings included

in the record, and then when they do not support his allegations direct that they be omitted; and for watching the Juror Thomas after he left the court house.

There is no single principle so well settled in criminal jurisprudence, or which appeals more strongly to the inate sense of justice in every man, than the principle that the accused is entitled to know definitely the charge against him, and is to be tried and sentenced on no other. The entire proceedings lead to the inevitable conclusion that the Court desired to punish defendants for shadowing Thomas, and from questioning the operations of the Trustee and Referee in Bankruptcy, and at the same time prevent any record being made which this Court could review.

He received the letter ten days before he moved to punish the alleged "obstruction of justice," but he moved immediately after he got the detective's affidavit.

We confidently assert that (1) No offense is charged against petitioner; (2) No offense is proven against him; (3) No trial has been had; (4) No legal sentence pronounced.

He is deprived of his liberties without due process of law; fundamental safeguards denied him and even the right of review emasculated.

Wherefore, we pray that the writ of certiorari applied for be granted.

Respectfully submitted,

J. A. TEMPLETON,
G. A. STULTZ,
W. E. SPELL,
CHAS. A. BOYNTON,
E. HOWARD McCALEB,
EDWIN C. BRANDENBURG,
Attorneys for Petitioner.